
INITIAL DISCUSSION DRAFT

EPA ANNOUNCEMENT DAY PROJECT:

EMPLOYER LETTER IN RESPONSE
TO POSSIBLE INQUIRY ABOUT
EPA ANNOUNCEMENT DAY

May 18, 1992

*This is an updated
Sept. 1992 version*

CONFIDENTIAL ATTORNEY-CLIENT MEMORANDUM
CONTAINING OPINION WORK PRODUCT
OF RETAINED OUTSIDE COUNSEL

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[DATE]

Dear Employer:

This responds to your recent letter concerning the Environmental Protection Agency's (EPA) designation of environmental tobacco smoke (ETS) as a Group A ("human") carcinogen. [The specific issue you have raised concerns the impact such a designation may have on {name of company}'s current policies regarding smoking in the workplace.] Thank you for contacting us.

In this letter, we will (i) **provide** you with background relevant to an informed evaluation of the EPA's Risk Assessment for ETS and the accompanying Workplace Smoking Policy Guide; (ii) suggest that you evaluate any action to restrict or ban smoking in your workplace in light of the Occupational Safety and Health Administration's (OSHA) position and ongoing activities concerning indoor air in the workplace; and (iii) [OPTIONAL] enclose a copy of our company's smoking accommodation policy as an example of one way to recognize the interests and freedom of both smoking and non-smoking employees.

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I. EMPLOYERS SHOULD CONSIDER THESE FACTORS IN
EVALUATING EPA'S CONCLUSIONS

The authors of the Risk Assessment and the Workplace Smoking Policy Guide, consistent with the strategy of the anti-smoking movement, present a health argument in order to justify recommendations on smoking restrictions and prohibitions. The argument, however, is without conclusive scientific support. In order to make informed decisions about smoking in the workplace, employers should be aware of the following factors:

- * The authors of the Risk Assessment did not consider a significant number of relevant, published studies reporting no significant associations between ETS exposures and nonsmoker disease, including 25 studies on childhood respiratory disease.
- * Nor did the authors consider 35 studies on actual exposure to ETS in public places, restaurants and the workplace. These studies suggest that typical exposures to ETS are minimal. For example, recent studies have reported that a nonsmoker in a typical public place is exposed to the nicotine equivalent of 1/100 to 1/1000 of one filter cigarette per hour. Based on those calculations, a nonsmoker would have to spend 100 to 1,000 hours in a

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typical office setting to be exposed to the nicotine equivalent of one cigarette.

- * The EPA draws conclusions concerning the purported risks of workplace exposure to ETS primarily on the basis of epidemiologic studies focusing on the lung cancer incidence of nonsmoking women married to smokers and provides no reliable association between workplace and spousal exposure.
- * The Risk Assessment disregards confounders in the purported association between lung cancer and spousal smoking. For example, it is now well supported in the scientific literature that women married to smokers generally have a poorer diet than women married to non-smokers. The most recent epidemiologic studies on ETS exposure and lung cancer have attempted to take this into account.
- * A number of studies on which the Risk Assessment is based were conducted on populations outside the United States, which raises questions about the validity of extrapolating from these studies to the United States population.

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- * The EPA documents fail adequately to address data from the available epidemiologic studies on lung cancer and exposure to ETS in the workplace. In fact, there are 12 studies that address this issue, and ten report no statistically significant association. In one of the two remaining studies, authors Kabat and Wynder suggest that their workplace exposure conclusion is inconsistent with the rest of the conclusions of their study.
- * The EPA Risk Assessment does not contain new scientific data. Rather, it reports on already-completed studies.
- * The Risk Assessment relies exclusively on one kind of evidence, epidemiologic, to the exclusion of relevant toxicological data from animal inhalation studies and short-term tests for mutagenicity.
- * Not one of the substances identified in ETS as "potentially carcinogenic" has induced lung cancer by inhalation in experimental animals. Such substances occur naturally in the environment and are even present in the foods we eat -- from hamburgers to orange juice. The levels of these substances in ETS often are minimal compared to the contributions from other sources.

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- * Only two to four percent of complaints from occupants in buildings investigated for sick building syndrome ultimately have been related to tobacco smoke exposures, even though some individuals initially reported annoyance or irritation in the presence of ETS. By contrast, more than half of the buildings investigated were found to have inadequate ventilation.
- * The foregoing suggests that even a total smoking ban is not likely to affect comfort problems in 96 to 98 percent of "sick buildings." "Prohibition of smoking has not been shown to have any measurable effect on either indoor air quality or associated health and comfort symptoms of sick building syndrome," a Canadian study reported.
- * Tobacco smoke is often initially identified as the cause of complaints about indoor air quality because it is easily seen and smelled. Actually, "hanging" tobacco smoke may be a symptom of inadequate ventilation.
- * ETS is not tobacco smoke per se, and chemists have determined that ETS is different in both quality and quantity than the smoke inhaled by the active smoker. ETS is a

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highly diluted, aged and chemically altered mixture of sidestream and exhaled mainstream smoke. This mixture changes as it ages and mixes with other substances present in room air. Quantitatively, the constituent levels found in ETS are diluted from 100 to 1,000 times the levels in mainstream and sidestream smoke. The Risk Assessment does not address these distinctions adequately.

- * While some have claimed that the only way to minimize exposures to ETS in the workplace is through a smoking ban or through a specially isolated and ventilated smoking room, a number of scientific studies on ETS levels in the workplace report that simple separation of smokers and nonsmokers effectively minimizes nonsmoker exposure to ETS.

- * A voluntary standards writing organization has developed a ventilation standard which is currently being adopted by various building code organizations and municipalities throughout the United States. This standard, called ASHRAE 62-1989, recommends ventilation rates to ensure adequate indoor air quality. The standard assumes the presence of smokers, and the ventilation rates are recommended to deal with ETS and other substances in the indoor

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air. The standard has been effective, and its implementation costs are minimal.

- * A smoking ban as a single solution to improving indoor air quality does not address the issues of inadequate ventilation and the potential build-up of invisible airborne substances. On the other hand, a uniform ventilation standard would address indoor air quality throughout the indoor environment.¹ Adequate ventilation always should be provided in any enclosed space, regardless of whether or not smoking is permitted.

Enclosed with this letter is a brochure which expands on these points and provides references for each one of them.
[Reader's note: brochure to come if it is felt to be appropriate.]

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1. Robert Axelrad, Director of the EPA Indoor Air Division, recently was quoted as acknowledging that "[l]ooking for single chemical contaminants isn't the answer" to ensuring acceptable indoor air quality. He explained that steps as simple as paying closer attention to sanitation and trash removal have reduced indoor air problems. "[P]eople should not be allowed to believe that addressing smoking will solve [all indoor air quality problems]. There are hundreds of other contaminants that need to be addressed," Axelrad said.

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II. EMPLOYERS MAY WANT TO CONSIDER OSHA'S POSITION
AND ACTIONS ON INDOOR AIR QUALITY

The Risk Assessment and Workplace Smoking Guide are informational documents; they are not regulations, and the EPA has no authority to sanction employers for non-compliance with the documents' recommendations. In fact, EPA has no regulatory authority over indoor air. Unless you are subject to a local ordinance or state law which is triggered by an EPA final determination, neither the Risk Assessment nor the Workplace Smoking Guide, by virtue of being formally adopted by the EPA, legally obligates you to take action to restrict or ban smoking in the workplace.²

Moreover, we note that the Workplace Smoking Guide was prepared for the EPA by associates of the Smoking Policy Institute, a firm which consults with industry and government for the development of policies on smoking restrictions.

The only federal agency which currently has authority to regulate indoor air in the workplace is OSHA, which has twice rejected petitions to institute emergency temporary standards for workplace exposures to ETS. You may already be aware that OSHA has published and has completed receiving written comments on a

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2. If you feel you may be subject to an ordinance or state law triggered by an EPA final determination, please consult your attorney.

Request for Information (RFI) on indoor air quality, in which OSHA invited the general public to respond to 92 separate questions concerning indoor air. The RFI inquired about a full range of indoor air quality issues, including ventilation, operation and maintenance of HVAC systems, indoor air quality (IAQ) investigation, radon, bioaerosols, volatile organic compounds (VOCs), ASHRAE standards, and IAQ costs. Environmental tobacco smoke, specifically included as a part of this overall inquiry regarding indoor air quality, is the subject of more than a dozen questions. [This letter assumes that the comment period will have expired before an employer letter is issued.]

Presently, an OSHA committee is reviewing the RFI comments to determine whether it is necessary and appropriate to regulate workplace exposures to substances in the indoor air environment. In this regard, it is important to note that OSHA's Director, prior to issuing the RFI, indicated that OSHA would duly consider a final EPA risk assessment on ETS as a part of its review of workplace indoor air quality.

As an alternative to preemptive action to ban or restrict smoking in your workplace, we suggest that you consider and evaluate the nature of the ongoing regulatory actions of OSHA with respect to the overall issue of indoor air quality in the workplace.

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III. A WORKPLACE SMOKING POLICY SHOULD ACCOMMODATE
THE INTERESTS AND FREEDOM OF BOTH SMOKING AND
NONSMOKING EMPLOYEES

Without prejudice to the discussion above, we recognize that ETS has come to represent an annoyance to some nonsmokers, and some people feel under social pressure when they smoke in public places. Accordingly, we are publicly committed to seeking accommodation for smokers and nonsmokers alike.

Except in areas where smoking is prohibited by state fire regulations, we are opposed to any form of smoking prohibition in offices or in other public premises. But we are not opposed to voluntary separation of smoking and nonsmoking areas in such premises, because we recognize that some nonsmokers prefer to avoid being in the presence of smoke and some smokers welcome the specific identification of smoking areas.

[OPTIONAL: As an example of a smoking policy that addresses these general considerations, we have enclosed a copy of the Smoking Accommodation Policy presently in effect at Philip Morris Companies, Inc.] [Reader's note: This statement contemplates revisions to present the Hamish Maxwell policy statement based on science and developments since 1988.] We recognize, of course, the need for your own smoking policy to

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reflect the individual needs of your workplace and applicable statutes or ordinances dealing with public smoking, if any. If you have any questions in this regard, please contact your attorney.

IV. CONCLUSION

We hope that we have responded adequately to your request. Please feel free to let us know, however, if you need further elaboration on any of the points we have made.

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